UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

STEVEN DOUGLAS,	)	
	)	**CAUSE NO. 1:13-cv-1351 WTL-MJD**
Plaintiff,	)	
	)	
v.	)	
	)	
CORIZON INC.,	)	
DR. RICHARD TANNER, M.D., and	)	
DR. VANCE A. RAHAM, M.D.,	)	
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION
TO MOTION FOR PARTIAL SUMMARY JUDGMENT

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Introduction

For more than two years while under the defendants' care, Steven Douglas was suffering from the serious medical condition of rectal bleeding caused by rectal cancer. Mr. Douglas complained of blood in his stool, black and tarry stools, extreme pain, rectal bleeding, inability to have a bowel movement despite urgency to do so, anal leakage, swelling and knots in rectum, and the inability to sit because of pain. The defendants admit that Steven Douglas's condition was serious, potentially fatal, and needed to be diagnosed and treated sooner rather than later in the disease's progression. Despite Mr. Douglas's repeated complaints that the defendants' treatment of him for hemorrhoids was not working, and his repeated requests that his condition be more fully examined and treated, defendants continued their ineffective treatment of him, never took the appropriate steps to adequately diagnosis and treat Mr. Douglas, and ignored many of his requests for health care.

During the course of his incarceration Mr. Douglas suffered needlessly and the gravity of his illness increased. After leaving IDOC's custody, Mr. Douglas was diagnosed in June 2013 with rectal cancer. The failure of these individual defendant physicians to rule out rectal cancer as the cause of Mr. Douglas's symptoms resulted in significant delays in the diagnosis and treatment of Mr. Douglas' cancer, caused his extreme pain and suffering, and resulted in the continued growth of the tumor during the delay. The delay attributable to the defendants required his present physicians to take more invasive and aggressive treatment options, consisting of removing his rectum and anus, leaving him with a permanent colostomy, erectile dysfunction, impotency, bladder dysfunction, and a shortened life expectancy.

Defendants claim their treatment of Mr. Douglas was not deliberately indifferent and point

to Defendant Tanner's offer to refer him for a consult and a possible colonoscopy. However, this occurred a year after Dr. Tanner began treating Mr. Douglas for rectal bleeding, and Dr. Tanner was aware that Mr. Douglas had been suffering from rectal bleeding for another full year before he first began seeing Mr. Douglas. Mr. Douglas testified that this was not a sincere effort to afford him help, since he was scheduled to be released soon, and, given the ordinary delay in sending prisoners out for medical care, Dr. Tanner knew he would be released prior to any such out-of-prison examination.

Similarly, while Mr. Douglas did not seek immediate health care once he was out prison, this does not effect or excuse these defendants' failures to treat him when he was in custody and under their sole care. Moreover, defendants have presented no medical evidence that any delay attributable to Mr. Douglas caused him any increased injuries or damages; this, in contrast to the uncontested medical evidence that the delays attributable to defendants caused Mr. Douglas harm. The evidence supports the conclusion that the bulk of Mr. Douglas' pain, suffering, and exacerbated injuries are properly attributed to defendants because: (1) the vast majority of the nearly two years he was incarcerated and experiencing these symptoms Mr. Douglas was in extreme pain and repeatedly begging defendants for care and treatment; and, (2) he was entirely dependant upon these doctors for his medical care, which they failed to provide.

Mr. Douglas, other prisoners, and visitors of Mr. Douglas, recognized that he was suffering from a serious illness and needed urgent medical help he was not receiving, and plaintiff's expert, Dr. Bryan Holcolmb, has examined the entire record in this case and concludes that defendants were indifferent to Mr. Douglas's reasonable medical needs, and that this indifference caused Mr. Douglas increased pain, suffering, and led to more invasive and less effective treatment, significantly reducing Mr. Douglas's quality of life and life expectancy. There are ample facts in this case to

permit a reasonable jury to agree with Dr. Holcomb. Accordingly, defendants' motion should be denied.

Statement of Material Facts Including Those in Dispute

1. Steven Douglas was an inmate in the Indiana Department of Correction ("IDOC") and confined to the IDOC's Indianapolis Re-Entry Facility ("IREF"), Plainfield Correctional Facility/Indiana Youth Center ("PCF/IYC"), Reception Diagnostic Center ("RDC") and Short Term Offender Program ("STOP") during various times from approximately August 2010 to January 16, 2013. Affidavit of Steven Douglas ¶3, 5, 8; IDOC Records Pack.

2. IDOC contracts with Defendant Corizon, Inc., a private corporation, for the provision of medical care to its inmates, including those at the facilities identified above. Plt's Amended Complaint ¶ 8, Defs' Answer ¶ 8.

3. Dr. Richard Tanner was a Corizon-contracted physician who provided medical treatment to inmates, including Mr. Douglas, at PCF/IYC during the time period of Mr. Douglas's incarceration. Plt's Amended Complaint ¶ 9; Defs' Answer ¶ 9.

4. Dr. Tanner was the medical director of PCF/IYC during Mr. Douglas's incarceration there, and, "was in charge of seeing acute care for any injuries, accidents, acute illnesses" and "in charge of chronic care for any chronic illnesses that the offenders would have." Tanner Depo. 8, lines 18-24; Douglas Aff. ¶ 6.

5. Dr. Vance Raham was a Corizon-contracted physician who provided medical treatment to inmates, including Mr. Douglas, at IREF and STOP during the time periods of Mr. Douglas's incarceration at these two facilities. Raham Depo. 7-8, 14; Douglas Aff. ¶ ¶ 4, 9.

6. Dr. Raham and Dr. Tanner were responsible for overseeing Mr. Douglas' care and treatment

for the vast majority of the time he was incarcerated between 2010 and 2013. Douglas Affidavit, ¶ 4, 6, 9; Raham Depo. 8-9, 13-14; Tanner Depo. 8.

7. Starting in September 2010, Mr. Douglas began to experience alarming and serious medical symptoms that included: blood in his stool, black and tarry stools, extreme pain, rectal bleeding, inability to have a bowel movement despite urgency to do so, anal leakage, swelling and knots in rectum, and the inability to sit because of pain. Douglas Medical Records Med Rec, Bates # 000011, 17, 18, 19, 22, 23, 26, 28, 29, 33, 34, 37, 41, 44, 48, 49, 54, 104, 122, 123, 126.[1]

8. Mr. Douglas submitted frequent and numerous requests for medical help using IDOC's Request for Health Care forms starting on or about September 21, 2010 through December 17, 2012. Med. Rec, Bates # 000011, 18, 21, 26, 33, 37, 41, 44, 48, 49, 54, 122, 123, 126.

9. As set forth in detail below, during this time period, Doctors Tanner and Raham provided only minimal care to Mr. Douglas and failed to provide diagnostic testing to determine the cause of his persistent and serious symptoms. *Id*.

10. Rectal bleeding may indicate a fairly benign problem such as hemorrhoids, but it can also indicate a more serious conditions, such as colon or rectal cancer. Tanner Depo. 22; Raham Depo. 17; Ziegler Aff. ¶ 6; Holcomb Aff. ¶ ¶ 9-12.

11. The standard of care for a patient exhibiting persistent bleeding unresponsive to treatment of potential causes such as hemorrhoids, is to have the patient examined by sigmoidoscope

[1] The page numbers cited for the medical records are the Bates' stamped numbers in the bottom right corner of the pages of the records in Plaintiff's Exhibit 1, and cited as: " Med. Rec, Bates # 0000" These records, created at several facilities over two years, have their own separate page numbers, which can be ignored for purposes of this action.

or colonoscope to rule out cancer as a cause. Dr. Ziegler Aff. ¶ 6; Dr. Tanner Depo. 23; Raham Depo. 17-18; Holcomb Aff. ¶ 11.

12. Corizon admits that, despite Mr. Douglas's nearly two years of complaining of unremitten rectal bleeding, he was never provided a rectal exam by sigmoidoscopy or colonoscopy. Corizon Admissions 2 and 3.

13. Given Mr. Douglas's age and symptoms, it was reasonable for the defendants to initially consider hemorrhoids and not cancer as the likely cause of Mr. Douglas's rectal bleeding. However, when his bleeding symptoms did not resolve after the initial treatment for hemorrhoids, they should have referred Mr. Douglas for a colonoscopy. Holcomb Aff. ¶ ¶ 8, 9; Ziegler Aff. ¶ 6. *See also* Raham Depo. 17-18; Tanner Depo. 22.

14. The standard of care for a physician confronted with a patient who is experiencing prolonged colon or rectal bleeding unresponsive to treatments is to prioritize the elimination of the more serious and potentially fatal causes of the bleeding. Tanner Depo. 22; Ziegler Aff. ¶ 6; Raham Depo. 17-18; Holcomb Aff. ¶ ¶ 8, 9, 11.

15. Early screening for cancer of a patient experiencing rectal bleeding helps avoid potentially more dangerous conditions for the patient. Tanner Depo. 22.

16. The sooner colon or rectal cancer is detected and treated, the better the outcome for the patient. Tanner Depo. 22; Ziegler Aff. ¶ 8; Raham Depo. 17 (early detection and treatment results "more than likely you would have better outcomes and better chances for survival."); Holcomb Aff. ¶ ¶ 8, 12.

17. If a cancerous tumor is not detected in its early stages of growth, the patient may need greater invasive treatment and the prognosis is generally worse. Tanner Depo. 22-23; Ziegler Aff.

¶ 8; Holcomb Aff. ¶ ¶ 8, 12.

18. The tumor in Mr. Douglas's rectum ultimately discovered once he was released from prison had been growing for years and was the likely source of his rectal bleeding from at least since 2010. Holcomb Aff. ¶ 16.

19. If Mr. Douglas's tumor was discovered and treated earlier, he likely could have avoided the complete removal of his rectum and anus. Ziegler Aff. ¶ 8; Holcomb Aff. ¶ ¶ 7,8, 9.

20. Plaintiff's expert Dr. Bryan Holcomb of Indiana University has examined the entire record in this case, and is of the opinion that: "the medical care of Mr. Douglas by Corizon and its physicians Vance Raham and Richard Tanner was below the applicable standard of care and was indifferent to Mr. Douglas's reasonable medical needs, and that these failures caused increased pain, suffering, and injury to Mr. Douglas. Holcomb Aff. ¶ 7.

21. Dr. Holcomb opines that "If Mr. Douglas had been examined with a colonoscopy soon after he first reported his symptoms, he could have been diagnosed and treated much earlier; avoided a very painful couple of years; had a better prognosis; might have avoided the APR surgery and permanent colostomy; and could have avoided the conditions of impotence, sterility, and bladder dysfunction from which he now suffers. Holcomb Aff. ¶ 26.

22. According to Dr. Holcomb, "It would have been obvious to objectively reasonable physicians presented with a patient exhibiting Mr. Douglas's symptoms for the period of time he suffered them that further diagnostic examination was necessary in order to rule out cancer as a cause of his symptoms. Holcomb Aff. ¶ 27.

23. Defendants have no expert witness opposing Dr. Holcomb's opinions.

Dr. Raham's 2010-2011 Treatment of Mr. Douglas

24. Dr. Raham was responsible for Mr. Douglas's health care at two different facilities at two different time periods, IREF from 2010 to 2011, and, as detailed (¶ ¶ 108-127 below), and at STOP from October 2012, until January, 16, 2013. Douglas Aff. ¶4, 9.

25. Mr. Douglas was incarcerated at IREF from August 3,2010, until February 28, 2011. Douglas Aff. ¶ 3; Ex. 3 (IDOC Records Pack).

26. During this time, Dr. Raham was the medical director at IREF and the sole physician on site. Raham Depo. 7-10, 14, 44.

27. As IREF's medical director and its sole physician, Dr. Raham was responsible for the medical care provided to the inmates, including Mr. Douglas. Raham Depo. 7-10, 14, 44; Douglas Aff. ¶ 4.

28. As detailed below, during his time at IREF, Mr. Douglas repeatedly complained about blood in his stool, and ineffective prior treatment options and he repeatedly requested that the cause of this problem be determined and treated. Dr. Raham was aware of Mr. Douglas's complaints of on-going rectal bleeding, but never personally examined Mr. Douglas. Instead, he consulted with the nurses regarding Mr. Douglas's health care requests, concurred with the nurses' treatment of him, including the decision to forego any rectal exam of Mr. Douglas, and simply prescribed a stool softener, which was never effective.

29. On September 21, 2010, while at IREF, Mr. Douglas completed a Request for Health Care, stating that he was experiencing blood in his stool, that he had previously seen a health care worker at Wabash Valley in the IDOC, his prior place of incarceration before IREF, who told him that it "was nothing major" but since that time the bleeding has worsened, that he

has blood every time he wipes or passes gas, and that "I know there is something wrong and I need it checked out." Med. Rec, Bates # 11; Raham Depo. 25.

30. Dr. Raham never responded to Mr. Douglas's September 21, 2010 Request for Health Care. Raham Depo. 25, Med. Rec, Bates # 11. Instead, Mr. Douglas was simply "educated" by a nurse about "signs to look for in case of upper GI bleed." Med. Rec, Bates # 11-13.

31. While Dr. Raham initially testified that this particular Request for Health Care never came to him (Raham Depo. 25), he later admitted that these records were available to him, and that *he had seen them* while treating Mr. Douglas at IREF. Raham Depo. 42-44. He also testified that he agreed with the nurses response, explaining that Mr. Douglas could purchase "suppositories" from the prison commissary, and that he could "eat more fiber and drink more water," even though he acknowledged that none of these measures would have provided any information about the causes of Mr. Douglas's long-term and unalleviated rectal bleeding. Raham Depo. 26.

32. On January 26, 2011, at IREF, Mr. Douglas made another Request for Health Care complaining of rectal bleeding. Med. Rec, Bates # 18. In this request, Mr. Douglas explained that "This is an ongoing issue with me. I came over a few months back about I was bleeding when I do a number #2. You guys gave me hemroid (sic) creme and its getting worse. The blood is getting darker and I really need to get this checked out. Thank you." *Id*.

33. Dr. Raham understands that when a patient experiences rectal bleeding it "is something you want to determine what the cause is" in order to treat it; that it could indicate something serious such as colon or rectal cancer; and, that the earlier such cancers are detected and treated the "more likely you would have better outcomes and better chances for survival."

Raham Depo. 17.

34. Despite this knowledge, Dr. Raham never responded to Mr. Douglas's January 26, 2011 Request for Health Care. Raham Depo. 28. Dr. Raham explained that under his protocols this Request would not come to him "because since the last time he complained about this was months prior to" this complaint, and that he would instead be directed to the nursing staff, which would make the decision about what to do, despite this being an ongoing and unresolved matter of rectal bleeding. Raham Depo. 28-29.

35. Mr. Douglas was seen by nurses in response to his January 26, 2011 Request, who, after consulting with Dr. Raham, decided to "defer" any anal examination of Mr. Douglas. Raham Depo. 31-32 ("Q: And would that be something she would have consulted you about? A: Yeah."); Med. Rec, Bates # 18.5, 19.

36. Three weeks later, on February 16, 2011, Mr. Douglas while at IREF, completed another Request for Health Care, asking to "see Doctor" and explaining "When am I going to see the Doctor. I done been over there [sick call] 3x about blood in my stools. I took the stool samples and don't ever hear anything back but I always get charged and its for the same thing every time. Can you please let me see the doctor so we can see what's wrong cause you ain't telling me nothing." Med. Rec, Bates # 21.

37. The nurses emailed Dr. Raham about Mr. Douglas's February 2, 2011 Request, which Dr. Raham acknowledged was complaining about blood in his stool for six months and requesting to see the doctor; instead of seeing and examining Mr. Douglas, Dr. Raham simply entered an order for Colace, a stool softener, for Mr. Douglas in the electronic medical record Raham Depo. 36-37, 39-40; Med. Rec, Bates # 18.5.

38. Defendants note that Mr. Douglas was given hemocult slides to check for blood in his stool and claim that he never returned some of them. Def's SJ Memo at 2-3.

39. However, Mr. Douglas has testified that he returned every hemocult slide he was given. Douglas Depo. 28-30.

40. Defendants claim that some of the hemocult slides Mr. Douglas returned were negative for blood (Def's SJ Memo 3), but omit Dr. Raham's admission that a negative occult slide only means that there was no blood present at the time the slide was marked, which could simply mean that his rectal bleeding was intermittent. Raham Depo. 32-33.

41. The following month, on February 28, 2011, while at IREF, Mr. Douglas completed a Chronic Care form stating that "Its not chronic care but is should be. I got Blood in my stools and its getting worse." Med. Rec, Bates # 22. There is no response in the medical records to this notation. *Id*

42. Despite being aware that Mr. Douglas had complained of continual rectal bleeding for over seven months while at IREF and for months previously at his prior institution, and repeatedly requesting to see him for medical care, Dr. Raham never saw or examined Mr. Douglas. Dr. Raham's medical care consisted of only reviewing these requests, concurring in the deferral of an anal examination, and the prescription of Colace, a stool softner. Raham Depo. 42-45.

43. Mr. Douglas was visited several times at IREF by his cousin Joshua Douglas. Joshua noted that his cousin had lost a considerable amount of weight, going from 250 to around 215 pounds. Steven also told his cousin during these visits that he had been bleeding from his rectum, that he made repeated requests for health care, and that nothing they were doing was helping him. Joshua Douglas Aff. ¶ ¶ 5-7.

44. Mr. Douglas also had another cousin, Paul Chestnut, who was incarcerated with him at IREF. Mr. Chestnut observed that his cousin lost weight, was in "a great deal of pain," and he was aware that Steven had made requests for health care and was told it was only hemorrhoids. Chestnut Aff. ¶ ¶ 3-8.

45. It was obvious to Mr. Chestnut that while at IREF "that something was wrong with Steven and that whatever the doctors were doing wasn't helping him." Chestnut Aff. ¶ 4.

Dr. Tanner's 2011-2012 Treatment of Mr. Douglas

46. Mr. Douglas was transferred from Dr. Raham's care at IREF to PCF/IYC on February 28, 2011. IDOC Record Pack; Douglas Aff. ¶ 5.

47. Dr. Richard Tanner was the medical director at PCF/IYC, and was responsible for Mr. Douglas's health care there from June 2011 until Mr. Douglas left the facility on April 12, 2012. Tanner Depo. 25, 66; Med. Rec, Bates # 69.

48. At PCF/IYC, Mr. Douglas was again incarcerated with his cousin Paul Chestnut. Chestnut Aff. ¶ ¶ 11-12.

49. Mr. Chestnut saw his cousin's medical condition deteriorate at PCF/IYC:

    a. At PCF/IYC it was obvious that Steven was still suffering from the same medical problem that he had at IREF and that whatever the doctors were doing about it was still not working.

    b. Steven constantly complained about rectal bleeding and that he could not get any medical help for the problem.

    c. By this time Steven had lost a lot of weight, and it was obvious that he was in a lot

of pain and that he needed help that he was not getting.

d. Steven was in so much pain that a number of times he could not even get out of his bed.

e. Steven was in so much pain that many times he had tears in his eyes because it hurt so much.

f. I was aware that Steven Douglas was putting in a lot of health care requests at PCF/IYC to see the doctor for help with his condition.

g. Steven would come back from his doctor visits and say that the doctors keep telling him he only had hemorrhoids.

h. It was clear that Steven was suffering from something more than hemorrhoids.

i. I remember telling Steven one time that he should get a CAT scan to find out what was wrong with him.

j. The doctors would give Steven ointment or some pills for hemorrhoids, but nothing was working.

k. The whole time at PCF/IYC Steven needed medical care and never got any care that truly helped him.

l. I thought something was seriously wrong with Steven because of how much pain he was in at both IREF and PCF/IYC, he was continually bleeding from the rectum, and the fact that he lost so much weight. I was worried for him.

Chestnut Aff. ¶ ¶ 13-24.

50. Dr. Tanner had access to all of Mr. Douglas's prison medical records during his treatment of Mr. Douglas (Tanner Depo. 21, 26-27); was aware that Mr. Douglas had experienced

rectal bleeding for over a year before Dr. Tanner even began to treat him (Tanner Depo. 25-27); and was aware that Mr. Douglas continued to complain of rectal bleeding the entire time Dr. Tanner treated him from June 2011 until his release from PCF/IYC ten months later in April 2012. Tanner Depo. 25; Med. Rec, Bates #69.

51. On March 5, 2011, Mr. Douglas completed a Request for Health Care which stated that "I was at I.R.E.F. and was suppose to see the Doctor about blood in my stools. Every time I fart I get blood in my boxers. Can you please get me to see the doctor. The stool softeners, hemorrhoidal ointment none of that stuff is working. Its getting to where the blood is dark like a maroonish color. Can you get me over there please?" Med. Rec, Bates #26.

52. On March 7, 2011, Mr. Douglas was seen by nurse Carol Griffin. She recorded her observation of the patient producing a stool sample with a bright red blood clot approximately the size of a quarter (Med. Rec, Bates #28) and referred him to the medical doctor sick call. *Id*.

53. Mr. Douglas was seen on March 10, 2011, at PCF/IYC by Dr. James Mozzillo, who preceded Dr. Tanner at the facility (Dr. Tanner replaced Dr. Mozzillo in June 2011). Dr. Mozzillo performed a digital rectal exam on Mr. Douglas, and diagnosed him with a "thrombosed hemorrhoid." Med. Rec, Bates #30. Dr. Mozzillo prescribed Colace, Fibercon, Anusol, and Nupercainal for Mr. Douglas, and advised him to drink "lots of water." Med. Rec, Bates #31.

54. On July 24, 2011, Mr. Douglas submitted a Request for Health Care, citing an "ongoing problem," and again complaining of blood in his stool. He stated that he had been seen by a doctor "about 3 months ago" who diagnosed him with hemorrhoids and prescribed stool softeners, cream, and pills, but "none of this seems to work at all. The problem seems to be

getting worse. I think there is something else wrong, and I need to see the doctor again please." Med. Rec, Bates #33.

55. Mr. Douglas's complaint was referred to Dr. Tanner. Med. Rec, Bates #33; Tanner Depo. 25.

56. In response to Mr. Douglas's request, Dr. Tanner saw Mr. Douglas on August 2, 2011, and noted that Mr. Douglas had "rectal bleeding x 1 year" and that he was "getting new labs to see if he is anemic." Med. Rec, Bates #34; Tanner Depo. 30-31, 71.

57. Dr. Tanner performed a digital rectal exam on Mr. Douglas on August 2, 2011, noted that "he has red blood on exam and he is tender. It feels like he has an internal hemorrhoid." Med. Rec, Bates #34; Tanner Depo. 33-34.

58. Dr. Tanner acknowledges that he does not know whether a malignant tumor would feel different than a hemorrhoid on a digital rectal exam. Tanner Depo. 28 ("I don't know that it would feel different.").

59. Dr. Tanner would have needed a sigmoidscope or a colonoscope to adequately diagnose Mr. Douglas. Tanner Depo. 18-19; Holcomb Aff. ¶ ¶ 8-10.

60. When Dr. Tanner was in private medical practice, his office was equipped with a sigmoidscope which was useful in his examination his patients' lower colon tracts. Tanner Depo. 19-20.

61. However, Corizon did not have sigmoidscopes or colonoscope at its prison facilities, Tanner Depo. 19.

62. Mr. Douglas was improperly diagnosed with a thrombosed hemorrhoid, and, even if he had one, it would not have accounted for the symptoms of continued rectal bleeding. Also, these clots usually work themselves out or resolve, and are not a long term condition. Holcomb

Aff. ¶ 25.

63. Based upon his examination, Dr. Tanner determined that Mr. Douglas had "possible" Inflammatory Bowel Disease, although he never confirmed whether Mr. Douglas actually had this condition, yet Dr. Tanner prescribed Mr. Douglas the steroid prednisone. Tanner Depo. 34; Med. Rec, Bates # 36.

64. A physician cannot diagnose Inflammatory Bowel Disease without doing a colonoscopy and a biospy. Raham Depo. 19-20.

65. It was below the standard of care for Dr. Tanner to treat Mr. Douglas for Inflammatory Bowel Disease without first confirming that condition by way of a colonoscopy. Holcomb Aff. ¶23.

66. Mr. Douglas did not have Inflammatory Bowel Disease, and he should never have been prescribed steroids, which present their own dangers. Holcomb Aff. ¶24.

67. On August 20, 2011, Mr. Douglas submitted a request for Health Care directed to Dr. Tanner, stating: "I know you told me to try the anti-inflammatory and Zantac for 30 days and see if it helps but its been 18 days and if anything its gotten worse as far as the pain. There's still blood in my stool. My kidneys are starting to hurt pretty bad and I think we should check my kidneys out. I need something for the pain. Let's please quit guessing and do X-Rays. The blood is getting worse." Med. Rec, Bates #41; Tanner Depo 43.

68. Dr. Tanner replied that Mr. Douglas was due to be seen in a follow-up visit soon. Med. Rec, Bates #41; Tanner Depo 43.

69. Seven days later, on 8-27-2011, Mr. Douglas submitted another Request for Health Care directed to Dr. Tanner, stating: "Look sir I'm not trying to keep bugging you all the time but

my problem is getting pretty severe. Ever since you gave me the anti-inflammatory and Zantac it seems my problems are getting worse. I haven't really shit in 3 or 4 days but if feels like I have to bad. And when I wipe its always a dark maroon instead of red now. I need help bad. Does my family have to call to get me help?" Med. Rec, Bates #37; Tanner Depo. 38.

70. The undated response to this request, written by Dr. Tanner, states, "We are getting new blood tests next month to see if you have improved." Med. Rec, Bates #37; Tanner Depo. 39.

71. On October 5, 2011, Mr. Douglas submitted yet another Request for Health Care directed to Dr. Tanner, stating that he had run out of Prednisone and that "the problem is still happening." Med. Rec, Bates #42; Tanner Depo. 44.

72. Dr. Tanner noted in response to Mr. Douglas's request that "blood test good" meaning that his hemoglobin level had increased, but Dr. Tanner acknowledges that he had no way of knowing whether Mr. Douglas's bleeding had decreased. Med. Rec, Bates # 42; Tanner Depo. 44-45.

73. On November 2, 2011, Mr. Douglas submitted a Request for Health Care stating that the bleeding had not slowed down, and that "its gotten worse if anything." Mr. Douglas stated his belief that further tests are needed. Med. Rec, Bates #43; Tanner Depo. 45-46.

74. The response, dated November 7, 2011, was that Mr. Douglas would be scheduled for "MDSC," which means "medical doctor sick call." Med. Rec, Bates #43.

75. On November 8, 2011, Dr. Tanner saw Mr. Douglas, noted that he had seen him two months ago for rectal bleeding, and had started him on prednisone. Med. Rec, Bates #52. Dr. Tanner testified that at the time he was aware that Mr. Douglas's rectal bleeding had been ongoing

for over a year and that he was still experiencing bleeding. Tanner Depo. 46-48.

76. On November 19, 2011, Mr. Douglas submitted a Request for Health Care directed to Dr. Tanner, stating: "These meds are not helping with anything. I can't even shit anymore. I haven't shit in 3 days. I'm begging you can you please do some x-rays of my stomach and my rectum. I can't take this no longer man. Please can you do this for me?" Med. Rec, Bates # 48; Tanner Depo. 50-51.

77. The response, dated November 22, 2011, states that the request will be "forwarded to the doctor." Med. Rec, Bates # 48. The doctor to whom this refers is Dr. Tanner. Tanner Depo. 7-8.

78. On November 30, 2011, Mr. Douglas, having not heard a response from Dr. Tanner to his November 19, 2011 Request, submitted another Request for Health Care stating: "I still can't shit and the blood looks like oil. This is the last time I'm writing you. I'm done begged you to get something done about this and I can't take it no longer. My mother will be calling down town on you and I'm writing the Superintendent. You're playing with my life here this shit is serious, I'm not joking." Med. Rec, Bates # 49.

79. The person who wrote the response, stated, "I will forward your concerns to the doctor." Med. Rec, Bates # 49.

80. Dr. Tanner did not see Mr. Douglas in response to this Request for Health Care, but instead responded in writing on the Request for Health Care form, "your labs are improving. Keep taking your meds. We are seeing you again next month." Med. Rec, Bates #49.

81. On December 12, 2011, Mr. Douglas submitted an Offender Grievance stating that he has had blood in stool for 9 months straight, that his prescribed medication "hasn't helped at all

and in fact its gotten way worse over the past two months. The blood is black and tary and even when I pass gas its nothing but blood. I filled out another Health Care slip on 11-19-11 and he [Dr. Tanner] still hasn't called me over. ... I'm in pain 24/7 and I can't take it anymore." Mr. Douglas asked to "Get me to the hospital and get x-rays done on my stomach and rectum to see what's really wrong instead of guessing so they can put me on the right medication." Ex. 12 (Offender Grievance and Response).

82. Mr. Douglas's grievance was received by IDOC staff on December 5, 2011, and returned two days later with a statement that the grievance was rejected because it complained about "multiple issues," was submitted "too late," and did not show that he tried to resolve the complaint "informally." Offender Grievance and Response.

83. Mr. Douglas saw Dr. Tanner on December 14, 2011, and Dr. Tanner offered to do another digital rectal exam, which Mr. Douglas declined because of the previous painful exams and his experience that the other digital exams resulted in the same hemorrhoid diagnosis. Med. Rec, Bates #51; Tanner Depo. 55-56; Douglas Depo. 34 ("it was just too painful");Douglas Depo. 94 ("It was too painful for you to even touch it"); *id*., at 94-95 ("impossible" for him to do the digital exam).

84. Digital rectal exams can be painful and are inconclusive. When a patient who has rectal bleeding has a problem submitting to one because of discomfort, the standard of care is not to just document that such a test was offered and declined, but to offer additional less painful and more accurate testing, such as a sigmoidoscopy or colonoscopy under sedation. Ziegler

Aff. ¶ 7; Holcomb Aff. ¶ 10.[2]

85. On that December 14, 2011,visit, Dr. Tanner assessed Mr. Douglas with "hemorrhoids?" but he subsequently testified that he just didn't know what he had. Med. Rec, Bates #52; Tanner Depo. 55-57.

86. On February 2, 2012, Mr. Douglas submitted a Request for Health Care directed to Dr. Tanner stating that the hemorrhoid cream was not helping his pain and he needed something for the pain. He stated that he could barely have a bowel movement. Med. Rec, Bates #54.

87. On February 3, 2012, Mr. Douglas was seen by Nurse Ltia Lewis in nursing sick call in response to his previous day's Request for Health Care. Nurse Lewis wrote: "Offender presents to clinic with c/o blood in his stool and abn discomfort. Offender has history of hemmroids (sic), and has on order for hemmoridal ointment. Offender states he does not pass any feces only black blood." Nurse Lewis wrote in all capital letters that "OFFENDER STATES HIS BM IS PURE BLOOD." Med. Rec, Bates #56. Nurse Lewis wrote that she was referring Mr. Douglas to the "provider" meaning Dr. Tanner, for Mr. Douglas's "significant rectal bleeding/anal warts/fissures." Med. Rec, Bates #57; Tanner Depo. 58-59.

88. On February 7, 2012, Dr. Tanner saw Mr. Douglas, noted that he had "continual rectal bleeding," and that his hemoglobin had dropped from 12.5 on 11/9/11 to 8.9 on 1/6/12. Dr. Tanner talked Mr. Douglas into taking prednisone again; diagnosed him with "bleeding

[2] Even when Mr. Douglas was ultimately released from prison, he could not submit to a digital rectal exam by his surgeon Dr. Ziegler because it was just to painful. Med. Rec, Bates #188 (exam with Dr. Ziegler) ("too much pain to tolerate digital exam"). When Mr. Douglas had his first colonoscopy under sedation, it had to be aborted because it was obviously too painful for him. Med. Rec, Bates #189 ("the procedure had to be aborted due to severe pain"); Douglas Depo. 194-195. The procedure was ultimately redone under general anesthesia. Med. Rec, Bates #190; Douglas Depo. 94-95.

hemorrhoids and possibly inflammatory bowel disease," and stated that Mr. Douglas did not want to see a specialist because he was so close to release. Med. Rec, Bates #57; Tanner Depo. 59-60.

89. Dr. Tanner did not have Mr. Douglas complete a health care refusal form. Tanner Depo. 60.

90. Mr. Douglas testified that he stated he would get it looked at when he was released the following month because the prison health care services had not done anything for him to date, and given the delays inherent in seeing an outside specialist, there was no way he would have been scheduled for such a visit prior to his imminent release. Douglas Depo. 36, 62-63, 90-91.

91. Mr. Douglas testified that Dr. Tanner's referral to an outside doctor was not genuine because he observed Dr. Tanner's computer screen while in his office which showed Mr. Douglas's release date, and that Dr. Tanner knew he was to be released soon and would be unable to complete any outside visit. Douglas Depo. 36, 62-63, 90-91.

92. On March 9, 2012, Mr. Douglas, submitted another Request for Health Care directed to Dr. Tanner, in which he repeated that he was still having trouble having a bowel movement and needed the doctor's help. Med. Rec, Bates #60.

93. There is no indication in the medical records that Dr. Tanner ever responded to this (Med. Rec, Bates #60) request. Tanner Depo 60-61. In his deposition Dr. Tanner testified that it was not a serious matter for a patient who has had rectal bleeding for years to be unable to defecate, so long as the patient's vital signs were normal. Tanner Depo. 60-62.

94. In the nurse's note on this Request for Health Care, dated March 10, 2012, it was noted that Mr. Douglas had been previously prescribed Colace, a stool softener. Rectal bleeding was

also noted. Med. Rec, Bates #60.

95. On March 18, 2012, Mr. Douglas submitted yet another Request for Health Care stating that he was light-headed, dizzy, his balance was off, and felt something was not right. Med. Rec, Bates #64.

96. On March 19, 2012, in response to this request, Nurse Hopkins referred Mr. Douglas to Dr. Tanner. Med. Rec, Bates #64.

97. There is no indication in the medical records that Dr. Tanner ever responded to this request for health care, and he has no recollection of responding. Tanner Depo. 66.

98. Mr. Douglas's cousin, Joshua Douglas visited Steven several times at IYC/PCF. Joshua Douglas noted that his cousin had lost "a lot more weight," "looked bad, like something was wrong with him," and was still complaining of rectal bleeding that was unalleviated by any medical care. Joshua Douglas Aff. ¶ ¶ 9, 10.

99. It was"very obvious" to Steven's cousin Joshua Douglas that "something was seriously wrong with Steven and that he needed medical attention he was not getting." J. Douglas Aff. ¶ 17.

100. Mr. Douglas was released from IYC/PCF on April 12, 2012. Tanner Depo. 66; Med. Rec, Bates #69; Douglas Depo. 38, lines 9-10; IDOC Records Pack.

101. Dr. Tanner was fired from Corizon in August 2012. Tanner Depo. 72. He says he was not given a reason, and he did not want to know why. *Id*.

102. Dr. Tanner surrendered his federal narcotics license in 1995 because he had been an opiate addict for ten years. Tanner Depo. 78.

103. Dr. Tanner has had at least ten other lawsuits alleging medical malpractice filed against him.

Tanner Depo. 76.

104. After his release, Mr. Douglas sought medical care for rectal bleeding and pain at St. Francis Hospital on July 2, 2012 but was not diagnosed or treated because he had to leave the hospital to pick up his young son who was stranded and dependent upon him. Douglas Depo. 38, 41-42, 47-48.

105. Mr. Douglas did not seek further medical care for the next three months, from July to September 17, 2012, because during this time he thought his problems were hemorrhoids as that is what the DOC doctors had been telling him all along, and he was taking better medicine for that condition now that he was not incarcerated, rather than the generic medicine he had been prescribed while in prison, and he was hoping that these medications would solve his condition. Douglas Depo. 42, 46. He also feared being rearrested and sent back to the Department of Correction. Douglas Depo. 51.

106. Mr. Douglas was arrested on September 17, 2012, and re-incarcerated, first in the Marion County Jail for 13 days until October 1, 2012, followed by 8 days at the IDOC's RDC, and finally at STOP for three months from October 18, 2012 to January 17, 2013. Douglas Aff. ¶ 8.

107. Mr. Douglas was seen by Dr. Jill Galien at RDC facility, who offered him a rectal exam. Mr. Douglas could not submit to it though because it was too painful. Douglas Depo. 57 ("like I said, I had a tumor coming up beside – I mean, I couldn't even– feces couldn't pass through. I couldn't do nothing. So why would I – I couldn't even wipe my ass, let along let somebody stick their finger in there.").

Dr. Raham's 2012-2013 Treatment of Mr. Douglas

108. Dr. Raham was again responsible for Mr. Douglas's health care, this time from October 18, 2012, through January 17, 2013, at STOP and was the medical director and sole physician at this facility while Mr. Douglas was incarcerated there. Raham Depo. 7-10, 14; Douglas Aff. ¶ ¶ 8-10.

109. Joshua Douglas visited his cousin Steven several times at STOP. According to Joshua, Steven had lost even more weight, was down to around 170 pounds. Steven was "skinny, his complexion was horrible and very pale, and it was obvious something was wrong with his health." Joshua Douglas Aff. ¶ ¶ 11, 12.

110. Steven told his cousin Joshua that he had repeatedly requested help from the prison doctors, but that they continued to tell him that he either had hemorrhoids or Crohn's Disease, and that nothing they gave him seemed to work. Joshua Douglas Aff. ¶ 14

111. According to Joshua, "Steven was in a lot of pain during our visits at STOP. On three visits he could not even stay for the whole visit because he could not sit down for that long. He would have to get up to leave, go to the restroom, and lay down rather than sit." Joshua Douglas Aff. ¶ 13.

112. Joshua was so worried about his cousin that he did his own research on Crohn's Disease, and while he didn't know what was wrong with Steven, it "was obvious that something was seriously wrong with Steven and that the treatments he was provided were not working" and, that "he needed medical attention he was not getting." Joshua Douglas Aff. ¶ ¶ 15-17.

113. On November 4, 2012, while at STOP, Mr. Douglas submitted a Request for Health Care stating that he could not have a bowel movement; that (his rectum) was so inflamed and not

allowing anything to pass through; that when he passes gas a brown liquid comes out; and, that his skin was turning yellow. Med. Rec, Bates #122; Raham Depo. 54.

114. The nurse at STOP emailed Dr. Raham about Mr. Douglas's Request for Health Care, but the medical records do not document that Dr. Raham responded to the Request. Raham Depo. 54-55.

115. On November 15, 2012, Mr. Douglas submitted another Request for Health Care directed to Dr. Raham stating that "Something is seriously wrong with me and I need to get some tests run on me to see what's wrong or get me the right stuff to fix it. The problem is every five minutes my body is telling me I have to shit but I never can and theres constantly liquidy stuff leaking from my anus. It feels like something is about to bust. Please can you help me find out what's wrong." Med. Rec, Bates #123; Raham Depo. 55.

116. The November 21, 2012, response to this request stated that Dr. Raham was emailed. Med. Rec, Bates #123; Raham Depo. 55-56.

117. Dr. Raham did not see Mr. Douglas in response to his Request for Health Care, instead he directed the nurses to provide Mr. Douglas magnesium citrate for constipation and a suppository. Raham Depo. 56; Med. Rec, Bates #123.

118. On December 12, 2012, Mr. Douglas submitted a Request for Health Care stating his (what he believed to be) hemorrhoids were getting worse and he needed more cream. Med. Rec, Bates # 125.

119. Dr. Raham did not see Mr. Douglas in response to this Request for Health Care. Instead, on December 17, 2012, Dr. Raham wrote on this Request, ignoring Mr. Douglas's complaint that his "hemorrhoids" were getting worse, that Mr. Douglas was to "get the ointment from

Commissary." Med. Rec, Bates # 126; Raham Depo. 58.

120. On December 17, 2012, Mr. Douglas submitted another Request for Health Care stating, "This is an emergency. I got a knot coming up beside my rectum that making my left butt check swell up. It hurts real bad and I need to be seen by the Doctor. I think something or something up with my hemorrhoids Can you please get me over there ASAP. I can't sleep or sit down half the time! Thank you." Med. Rec, Bates # 126; Raham Depo. 58.

121. The December 18, 2012, response to this request states that Dr. Raham was emailed. Med. Rec, Bates # 126.

122. Dr. Raham does not recall ever physically examining Mr. Douglas in response to these health care requests and emails from his nurse, and there is no indication in the medical records that he did so. Raham Depo. 56. Instead, Dr. Raham simply instructed the nurses to provide Mr. Douglas with a "doughnut cushion" to sit on (joking not to make it a "jelly-filled" one) and some bacitracin. Med. Rec, Bates # 126; Raham Depo. 59-60.

123. On December 31, 2012, Dr. Raham finally saw Mr. Douglas in a chronic care visit. Med. Rec, Bates # 127; Raham Depo. 60-63. Dr. Raham documented that Mr. Douglas was compliant, meaning he was taking his medications, that his hemoglobin had decreased to 7, indicating chronic or acute bleeding. *Id*. Dr. Raham placed Mr. Douglas on an iron supplement, and stated in the medical record that Mr. Douglas was to be released in 2 weeks and instructed him to follow up with his private physician. *Id*. Dr. Raham now states Mr. Douglas refused care, but he did not document any such refusal in the medical records. *Id*.

124. On January 17, 2013, nearly two and a half years after Mr. Douglas began to complain about blood in his stool and symptoms which were never alleviated nor the cause determined, Mr.

Douglas was released from the IDOC. Med. Rec, Bates #138-139; Douglas Aff. ¶ 10.

125. Even though he had consistently complained about rectal bleeding unresponsive to any treatment for over two years, Mr. Douglas was never provided a colonoscopy or sigmoidoscopy this entire time. Corizon Admissions 2 and 3.

126. Over the course of the two and one half years that Mr. Douglas complained of these symptoms, he was prescribed hemorrhoid cream, iron pills, colace, anusol, and prednisone, none of which alleviated his symptoms (Med. Rec, Bates #23, 27, 36, 56, 51, 52, 55); Tanner Depo. 27, 29.

127. Despite making it known that the medicines were not helping him and that his symptoms were getting worse while incarcerated, Mr. Douglas was never screened for cancer or any other conditions. Douglas Aff. 12; Tanner Depo. 29; Corizon Admissions 2, 3, 4.

128. After Mr. Douglas was released from prison, he still thought he had hemorrhoids, but his mother who saw him suffer convinced him to get on a waiting list for medical care at Wishard Hospital, which he did, and he was on that waiting list for three to four months, before finally being seen in April, 2013. Douglas Depo. 64-66.

129. Mr. Douglas was ultimately admitted to Wishard Hospital on May 31, 2013, and shortly thereafter was diagnosed with rectal cancer. Med. Rec, Bates #182, 186-187; Douglas Depo. 64-66; Douglas Aff. ¶ 18; Ziegler Aff. ¶ ¶ 1, 4.

130. Dr. Raham left employment with Corizon after a meeting with the state medical director on October 23, 2013. Raham Depo. 63. While Dr. Raham at first said it was solely his decision to resign, when pressed he admitted that the issue of patient care was discussed at the meeting, and that Corizon disagreed with him regarding a medical procedure he had

performed on a patient, which ultimately led to a malpractice action being filed against him. Raham Depo. 66-68.

131. Dr. Raham previously "had issues" with his license (Raham Depo. 66), and had a probationary medical license from 2005-2009 while he was on the Impaired Physician Program. Raham Depo. 74, 75. He also had his staff privileges revoked from Fayette Memorial Hospital in Connersvile in 2005. *Id.* Dr. Raham has had seven or eight complaints of malpractice filed against him. Raham Depo. 72.

132. Before he was hired by Corizon, Dr. Raham had previously engaged in documented medical malpractice as determined in 2006 and 2007. A medical malpractice finding was also made against Dr. Raham in 2010. Claims Summary Report for Dr. Vance Raham, IN Patient's Compensation Fund, (generated 5/22/2014); Corizon's Admission No. 5.

133. When he was examined for his rectal bleeding at Wishard, Mr. Douglas's tumor was so large it had grown outside his anus and was visible by sight. Holcomb Aff. ¶ 15; Ziegler Aff. ¶ 14.

134. In order to treat his cancer, Mr. Douglas underwent radiation, chemotherapy and surgery. The surgery involved the complete removal of his distal colon, rectum, and anus. Holcomb Aff. ¶ ¶ 20; Ziegler Aff. ¶ 4.

135. As a result of the treatment and surgery, Mr. Douglas now has a permanent colostomy, is impotent and thus unable to have children, and his cancer has returned and spread, a condition for which he has undergone eight months of post-surgery chemotherapy, and he is in constant and severe pain. His long term prognosis is not good. Med. Rec, Bates #193, 197-203; 188 (Dr. Ziegler) ("He will need chemoradiation ultimately an abdominoperineal resection with permanent colostomy."); 187 ("This type of invasive rectal cancer is typically

quite painful, and can be difficult to control."); 193 ("We discussed with the patient in no uncertain terms that the colostomy would be permanent"); Douglas Depo. 88-89, 91-94; Ziegler Aff. ¶ 4; Douglas Aff. ¶ 20-21.

136. Despite enduring eight months of post-surgery chemotherapy, Mr. Douglas's cancer has returned, it is Stage 4, spreading, and getting worse. Douglas Depo. 92-94; Douglas Aff. ¶ ¶ 20-22.

137. Mr. Douglas' survival is uncertain and his quality of life has been greatly diminished. Douglas Depo. 88-89, 92-94; Douglas Aff. ¶ ¶ 20-22.

138. The failure of the defendants to monitor and treat Mr. Douglas's serious medical condition led to the growth and spread of his cancer, prolonged his pain and suffering, and resulted in a significantly worse outcome for him and a diminished life expectancy. Holcomb Aff. ¶ ¶ 7, 12, 17, 18, 19, 20, 21, 26; Douglas Depo. 87-89, 92-94; Ziegler Aff. ¶ ¶ 6, 7, 8; *See also* Dr. Raham Depo. 17, Tanner Depo 22-23.

139. Defendants have not produced any expert witnesses.

140. Plaintiff has presented two expert witnesses, Dr. Matthew Ziegler, who performed Mr. Douglas's surgery, and Dr. Bryan Holcomb. Ziegler Aff.; Holcomb Aff.

141. Dr. Holcomb is a board certified colon and rectal surgeon and has reviewed the entire case file. It is Dr. Holcomb's expert opinion that "the medical care of Mr. Douglas by Corizon and its physicians Vance Raham and Richard Tanner was below the applicable standard of care and was indifferent to Mr. Douglas's reasonable medical needs, and that these failures caused increased pain, suffering, and injury to Mr. Douglas." Holcomb Aff. ¶ 7.

142. Specifically, Dr. Holcomb has opined the following:

a. Specifically, it is my opinion that Corizon and these two physicians failed to timely and adequately respond to Mr. Douglas's repeated rectal bleeding, and that they should have referred him for a colonscopy, which would have revealed his rectal tumor and triggered earlier intervention.

b. Given Mr. Douglas's age and symptoms, it was reasonable for these physicians to initially consider hemorrhoids, and not cancer, as the likely cause of Mr. Douglas's rectal bleeding. However, when his bleeding symptoms did not resolve with therapy directed at treating hemorrhoids, a lower endoscopy or exam under sedation should have been provided. Cancer should be considered in the differential diagnosis.

c. Determining the cause of rectal bleeding may properly involve a digital rectal exam, but sometimes these exams are painful and inconclusive. Mr. Douglas had several of these examinations while he was in prison, and he refused others at least in part because of the pain they involve. If a patient refuses such a painful examination, the standard of care of a physician is not to simply document the refusal, but to refer the patient to a physician who can perform a colonoscopy under sedation with a better chance for diagnostic success.

d. If a patient continues to experience rectal bleeding despite repeated treatment for hemorrhoids, the standard of care is for the physician to consider other causes, including cancer, as a possibility and try to eliminate it as a cause.

e. The time delay and lack of adequate referral and diagnoses allowed Mr. Douglas's tumor to grow, causing increased and prolonged pain to Mr. Douglas, and potentially causing the intervention to be more invasive and the result for Mr. Douglas worse.

f. Mr. Douglas was under the care of Corizon's correctional medical personnel, including Doctors Tanner and Raham for the majority of the time period from his first complaint of rectal bleeding in September 2010 until his ultimate release in January 2013. He was not in custody for approximately five of those months. The fact that Mr. Douglas did not obtain medical care when he was out of prison does not excuse the lack of care provided to him over the 28 months following his first complaint of rectal bleeding until his final release.

g. While he was released, Mr. Douglas had a CT scan on April 11, 2013, which did not detect the cancer. This does not mean that the tumor was not present then, as these types of diagnostic tests can fail to detect these types of cancers.

h. When Mr. Douglas was treated in June 2013, his tumor had grown out of the anus. It was visible by sight.

i. It was likely that this tumor had been growing for years. This cancer was likely present and causing symptoms in September 2010 when Mr. Douglas first complained about blood in his stool.

j. If Mr. Douglas's tumor was discovered earlier, it may not have grown as large or been as deep as it was before commencing treatment in June 2013.

k. Because this cancer was not caught and treated earlier, Mr. Douglas's prognosis for recurrence of cancer, either liver, pelvic, or lung, is now increased. If it had been caught earlier, the risk of recurrence might have been less.

l. The result of the APR surgery is that he has a permanent colostomy.

m. If the cancer was not as large, it is possible that Mr. Douglas could have avoided

chemo-radiation therapy prior to surgery, thus surgery would have been earlier.

n. If Mr. Douglas's tumor was less advanced, his treatment may have consisted of a local excision surgery where the rectum and anus are saved, instead of the more extensive APR surgery.

o. These conditions can be extremely painful, and if Mr. Douglas's cancer was treated earlier, he would have suffered less.

p. It was also below the standard of care to treat Mr. Douglas for Inflammatory Bowel Disease without first confirming that condition by way of a colonoscopy.

q. Mr. Douglas did not have Inflammatory Bowel Disease, and he should never have been prescribed steroids, which present their own dangers.

r. Mr. Douglas was improperly diagnosed with a thrombosed hemorrhoid, and, even if he had one, it would not have accounted for the symptoms of continued rectal bleeding. Also, these clots usually work themselves out or resolve, and are not a long term condition.

s. If Mr. Douglas had been examined with a colonoscopy soon after he first reported his symptoms, he could have been diagnosed and treated much earlier; avoided a very painful couple of years; had a better prognosis; might have avoided the APR surgery and permanent colostomy; and could have avoided the conditions of impotence, sterility, and bladder dysfunction from which he now suffers.

t. It would have been obvious to objectively reasonable physicians presented with a patient exhibiting Mr. Douglas's symptoms for the period of time he suffered them that further diagnostic examination was necessary in order to rule out cancer as a

cause of his symptoms.

Holcomb Aff. ¶ ¶ 8-27.

Standard of Review

The Seventh Circuit has recently pointedly reminded district courts that when considering summary judgment motions they must resist any urge to "weigh evidence, make credibility determinations, resolve factual disputes and swearing contests, or decide which inferences to draw from the facts." *Miller v. Gonzalez,* 761 F.3d 822, 827 (7th Cir. 2014). Instead, the evidence and all reasonable inferences that can be drawn from the evidence must be viewed in the light that is most favorable to the nonmoving party. *Id*.; *Bowens v. City of Indianapolis*, 2014 U.S. Dist. LEXIS 131540 *2, (S.D. Ind. Sept. 19, 2014). This is especially so in cases, like this one, which turn on questions of the defendant's state of mind or intent. In such cases, the Seventh Circuit has cautioned courts to be quite circumspect in evaluating the movant's factual averments "when evidence bearing on a particular matter lies within the exclusive possession of the party seeking summary judgment." *Avery v. Mapco Gas Prods., Inc.*, 18 F.3d 448, 452 n.4 (7th Cir. 1994); see *also Reserve Supply Corp. v. Owens-Corning Fiberglass Corp*., 971 F.2d 37, 42 (7th Cir. 1992).

Summary of Argument

There is sufficient evidence to enable a reasonable jury to conclude that all three defendants were deliberately indifferent to Mr. Douglas's serious medical needs. The facts in this case would support a jury's determination that Doctors Raham and Tanner should have responded to Mr. Douglas's years-long complaints of rectal bleeding that was unresponsive to their proscribed

treatment for hemorrhoids, by referring Mr. Douglas for a colonoscopy to rule out colon or rectal cancer as the cause of his bleeding. Their failure to provide timely and appropriate diagnostic testing subjected Mr. Douglas to needless pain and suffering, allowed Mr. Douglas's tumor to grow, and resulted in a significantly worse outcome for his health and prognosis. Plaintiff's evidence would also support a finding that the deliberately indifferent care received by Mr. Douglas was part of a pattern and practice of Corizon's deliberate indifference to the medical care of those entrusted to it.

It is true that towards the end of Mr. Douglas's incarceration and after years of neglect he refused an outside consult, stating that he would be out soon and have other doctors figure out what was wrong with him, and that he did not promptly do so. While defendants assert this caused Mr. Douglas's injuries, they present no medical evidence supporting their affirmative defense, and Mr. Douglas's actions in no way excuse defendants' repeated and years-long neglect of Mr. Douglas when he was incarcerated and completely dependant upon them for his health care. Additionally, plaintiff's evidence is that this was not a sincere offer of an outside consult, as it came too late in Mr. Douglas's incarceration to materialize. Mr. Douglas was in extreme pain and in dire circumstances during his time in prison and repeatedly requested that these doctors help him, both before and after the one refusal of care. Yet defendants still failed to provide medically necessary care to Mr. Douglas. They should be held responsible for their own actions and inactions, which a reasonable jury could conclude were deliberately indifferent to Mr. Douglas's serious medical needs, and which needlessly caused Mr. Douglas to suffer pain and exacerbated injuries.

ARGUMENT

A Reasonable Jury Could Find Defendants Deliberately Indifferent to Mr. Douglas's Serious Medical Needs

A. The Eighth Amendment Requires Evidence of Deliberate Indifference to a Prisoner's Serious Medical Needs

The eighth amendment is violated when correctional officials "act with deliberate indifference to the serious medical needs of an inmate." *Holloway v. Delaware Cnty. Sheriff*, 700 F.3d 1063, 1072 (7th Cir. 2012).Courts employ a two-part test to determine whether a defendant acted with deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). "First, the deprivation alleged must be, objectively, 'sufficiently serious.'"*Id*. (citation omitted). Second, the defendant "must have a 'sufficiently culpable state of mind.'" *Id*. (citation omitted).

To satisfy the objective component on a claim of deliberate indifference to a serious medical need, the claimant must show that the "medical condition is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor's attention." *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005). To satisfy the subjective component, the claimant must show that the "defendants knew of a substantial risk of harm to the inmate and disregarded the risk." *Id*.

B. Defendants Concede The Objective Component of the Eighth Amendment

Defendants concede that Mr. Douglas was suffering from a medical condition that was so serious as to satisfy the objective component of the eighth amendment's deliberate indifference test. Def's SJ Memo. 15 (Doc.57). This is important not just because it takes this issue off the table for purposes of defendants' summary judgment motion, but because of what is actually conceded.

Defendants correctly assert that an objectively serious medical condition for purposes of the eighth amendment is one "that has been diagnosed by a physician and that requires medical treatment, or is so obvious that even a lay person would easily recognize the necessity for a doctor's attention. Def/s SJ Memo. 15 (citing four Seventh Circuit cases). The first method of proof never occurred, as these defendants never diagnosed Mr. Douglas with rectal cancer. Therefore, for purposes of defendants' motion, they have conceded that Mr. Douglas's medical condition was so objectively serious that it was "obvious that even a lay person would easily recognize the necessity for a doctor's attention." This concession is applicable not just for the objective component of the eighth amendment test, but the subjective one as well.

C. Plaintiff's Evidence is Sufficient for a Reasonable Jury to Conclude that Defendants were Subjectively Aware that Mr. Douglas was Suffering from a Serious Medical Need

In order to satisfy the subjective component of the eighth amendment's deliberate indifference test, a plaintiff is required to produce evidence from which a reasonable jury could conclude that the defendants *"*knew of a substantial risk of harm to the inmate and disregarded the risk." *Greeno,* 414 F.3d at 653.

Of course, a claimant is not required to prove that a defendant "intended or desired the harm that transpired," *id.*, nor is the claimant required to "produce a direct admission of deliberate indifference." *Zentmyer v. Kendall Cnty., Ill.*, 220 F.3d 805, 813 (7th Cir. 2000). Instead, deliberate indifference may be proven "in the usual ways, including inference from circumstantial evidence . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 825 U.S. at 842. Indeed, as the Seventh Circuit has recognized, "[s]ubjective awareness and deliberate indifference normally can be proved only with circumstantial

evidence." *Hayes v. Snyder*, 546 F.3d 516, 524 (7th Cir. 2008).

Courts considering summary judgment motions should be cognizant that circumstantial evidence from which an inference of unlawful intent can be drawn is sufficient to create a triable issue of fact even in the face of the actor's declaration that no unlawful intent was present. See, e.g., *Corrugated Paper Prods. v. Longview Fibre Co.*, 868 F.2d 908, 914 (7th Cir. 1989); *Freeman v. Madison Metropolitan School Dist*., 231 F.3d 374, 380 (7th Cir. 2000) (relying on circumstantial evidence to find that the jury could have inferred that the defendant "could not honestly have believed that" the plaintiff's disability was permanent); *Farmer*, 511 U.S. at 842 ("deliberate indifference" is factual proposition which may be demonstrated through circumstantial evidence that risks were obvious); *Young v. Quinlan*, 960 F.2d 351, 359-60 n. 21 (3d Cir. 1992)(presence of deliberately indifferent state-of-mind unlikely to be resolved at summary judgment stage).

Plaintiff's evidence of Defendants Tanner and Raham's subjective awareness of the risk of harm to Mr. Douglas includes: a) defendants's concession that Mr. Douglas's condition was objectively serious; b) defendants' admissions that they were aware that continued rectal bleeding can indicate rectal cancer and that such a serious condition needs to be detected and treated early in order to avoid potentially catastrophic effects to the patient; c) defendants' continued ineffective treatment of Mr. Douglas; d) defendants completely ignored a number of Mr. Douglas's alarming requests for health care for objectively serious conditions; e) laypersons recognizing that Mr. Douglas was suffering from a serious medical condition that required additional medical care; f) Dr. Holcomb's opinion that objectively reasonable physicians would have recognized the need for additional diagnostic procedures; and, g) the two defendant doctors' long-standing pattern of providing inadequate health care to prisoners.

Dr. Raham

There is sufficient evidence in the record for a reasonable jury to draw the inference that Dr. Raham was deliberately indifferent to Mr. Douglas's reasonable medical needs.

Dr. Raham admits that Mr. Douglas's condition was objectively serious (Defendants SJ Memo. 15), but just disputes that he had the requisite subjective intent of deliberate indifference.

However, Dr. Raham treated Mr. Douglas for seven months in 2010-2011 at IREFand for another three months in 2012-2013 at STOP. All this time Mr. Douglas was complaining of rectal bleeding which was unrelieved from any treatment for hemorrhoids.

Dr. Raham admits that he was aware that rectal bleeding can indicate not just minor issues such as hemorrhoids, but more serious conditions such as cancer. Raham Depo. 16, lines 8-16. He also is aware of the need to detect and treat colon and rectal cancer early to have a "better outcomes and better chances of survival." Raham Depo. 17, lines 13-20. Yet, Dr. Raham never provided any treatment to Mr. Douglas which alleviated his rectal bleeding, and never suggested that Mr. Douglas be examined for cancer.

Despite being aware that Mr. Douglas had complained of continual rectal bleeding for over seven months while at IREF and for many months before that at his previous institution, and was repeatedly requesting to see him for medical care, Dr. Raham never even personally examined Mr. Douglas at that facility. Instead, Dr. Raham's medical care consisted of only reviewing and ignoring most of these requests, concurring in the deferral of an anal examination for Mr. Douglas, and only providing him one prescription of a stool softener. Raham Depo. 42-45; infra.

Dr. Raham's deliberate indifference is illustrated by the fact that he never responded in any way to the majority of Mr. Douglas's serious health care requests, even though they were forwarded

to him by the nurses, and involved obviously serious matters, such as Mr. Douglas's IREF complaints that his rectal bleeding "was an ongoing issue with me," that "its getting worse," "the blood is darker and I really need to get this checked out," (Med. Rec. Bates #18); and, "I got blood in my stools and its getting worse," (Med. Rec. Bates # 22).

Continuing his indifference at the STOP facility, Dr. Raham repeatedly ignored Mr. Douglas's requests for health care, despite their apparent urgency Med. Rec, Bates #122; Raham Depo. 54. (Dr. Raham ignored request where Mr. Douglas complained that he could not have a bowel movement; that his rectum was so inflamed and not allowing anything to pass through; that when he passes gas a brown liquid comes out; and, that his skin was turning yellow). Dr. Raham finally examined Mr. Douglas two weeks before he was to be released, and simply told him to get checked by a doctor once he was released..

Dr. Tanner

Similarly, there is sufficient evidence in the record for a reasonable jury to draw the inference that Dr. Tanner was deliberately indifferent to Mr. Douglas's reasonable medical needs.

Dr. Tanner admits that Mr. Douglas's condition was objectively serious (Defendants SJ Memo. 15), but just disputes that he did not have the requisite subjective intent of deliberate indifference.

However, Dr. Tanner had access to all of Mr. Douglas's prison medical records during his treatment of Mr. Douglas (Tanner Depo. 21, 26-27); was aware that Mr. Douglas had experienced rectal bleeding for over a year before Dr. Tanner even began to treat him (Tanner Depo. 25-27); and was aware that Mr. Douglas continued to complain of unrelieved rectal bleeding the entire time Dr. Tanner treated him from June 2011 until his release from PCF/IYC ten months later in April 2012.

Tanner Depo. 25; Med. Rec, Bates #69.

Dr. Tanner admits that he was aware that rectal bleeding can indicate not just minor issues such as hemorrhoids, but more serious conditions such as colon or rectal cancer. Tanner Depo. 22, lines 11-13. He is aware that eliminating the more serious cause of rectal bleeding sooner than later is important to avoid a potentially more dangerous condition for the patient and that the sooner colon or rectal cancer is treated, the better the outcome is generally for the patient. Tanner Depo, p. 22, lines 19-22. He is also aware that the later a cancer is caught it increases the need for more invasive treatment. Tanner Depo, p. 22 line 23 – p. 23, line 3. He also knows that in order to determine whether somebody has colon or rectal cancer, it is necessary to use a colonoscope to biopsy the tumor. Tanner Depo, p. 23, lines 8-19.

However, it was not until February 2012, just before Mr. Douglas was to be released, that Dr. Tanner even suggested that Mr. Douglas be referred to a specialist to diagnose the cause of his rectal bleeding. Plaintiff's evidence is that Dr. Tanner knew that Mr. Douglas was to be released soon before any such outside consult and trip could be arranged. Douglas Depo. 36, 62-63, 90-91.

Dr. Tanner's deliberate indifference is also illustrated not just by his failure to rule out cancer as the cause of Mr. Douglas's years-long rectal bleeding when he had knowledge that this was a possibility and presented a significant risk to Mr. Douglas's health, but also by his ignoring several of Mr. Douglas's serious requests for health care, such as when Mr. Douglas informed him that he was experiencing light-headedness, dizziness, and lack of balance (Med. Rec, Bates #64) (Tanner Depo. 66) and, when he informed the doctor that: "These meds are not helping with anything. I can't even shit anymore. I haven't shit in 3 days. I'm begging you can you please do some x-rays of my stomach and my rectum. I can't take this no longer man. Please can you do this for me?" Med. Rec,

Bates # 48; Tanner Depo. 50-51. Even though these requests was forwarded to Dr. Tanner, he never even replied. Med. Rec, Bates # 48; Tanner Depo. 7-8.

There is ample evidence for a jury to return a verdict in favor of Mr. Douglas on the eighth amendment claims against Doctors Tanner and Raham.

Deliberate Indifference Factors Common to both Dr. Tanner and Dr. Raham

This Court recognized in *Estate of Gee*, that "a plaintiff can ... establish deliberate indifference "by inference from circumstantial evidence, including evidence that the risk was so obvious that a jury may reasonably infer actual knowledge on the part of the defendants." *Estate of Gee v. Sharp*, 2009 U.S. Dist. LEXIS 27842 *28 (S.D. Ind. Mar. 31, 2009) (slip op. p. 18) (quoting *Vinning-El v. Long*, 482 F.3d 923, 924-25 (7th Cir. 2007)) (citations omitted). "Furthermore," as this Court continued in *Gee*, "if it was obvious to a layperson that [the prisoner] needed more serious medical attention, then it should have been even more clear to a trained medical professional." *Id*., at *30 (slip op. 19).

Laypersons Joshua Douglas and Paul Chestnut have stated under oath that it was obvious that something was seriously wrong with Mr. Douglas and that he needed medical attention and treatment that he was not receiving. Joshua Douglas Aff. ¶ ¶ 15-17; Chestnut Aff. ¶ ¶ 13-24.

As in *Gee*, the fact that jurors could rely upon the testimony of laypersons regarding the obviousness of the need for more serious medical attention to create an inference of deliberate indifference precludes summary judgment.

A reasonable jury could also find deliberate indifference by relying upon Dr. Holcomb's expert opinion that "It would have been obvious to objectively reasonable physicians presented with a patient exhibiting Mr. Douglas's symptoms for the period of time he suffered them that further

diagnostic examination was necessary in order to rule out cancer as a cause of his symptoms." Holcomb Aff. ¶ 27.

Deliberate indifference can also be inferred against these two defendants from their long course of ineffective treatment provided to Mr. Douglas. An Eighth Amendment claim may be stated where a prison doctor persists in a course of treatment known to be ineffective, fails to order further testing or refuses to refer the inmate to a specialist. *Greeno*, 414 F.3d at 655 (doctor continued ineffective treatment, and refused to order endoscopy or specialist referral over a two-year period during which plaintiff suffered from ulcer); *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir.2006) ("medical personnel cannot simply resort to an easier course of treatment that they know is ineffective.") (citations omitted); *Kelley v. McGinnis*, 899 F.2d 612, 616-17 (7th Cir. 1990) (inmate may prevail if he can prove that defendant "deliberately gave him a certain kind of treatment knowing that it was ineffective" or if it was 'the "easier and less efficacious treatment.'" (citing *Estelle v. Gamble*, 429 U.S. 97, 104 n.10 (1976)).

Plaintiff's evidence is sufficient for a reasonable finder of fact to conclude that Mr. Douglas complained *for years* that his rectal bleeding was unabated and unaided by defendants' treatment of him for hemorrhoids. Hemorrhoid creams, steroids, and doughnut cushions did nothing to alleviate Mr. Douglas's bleeding or his pain and suffering. Mr. Douglas repeatedly made these two physicians aware that nothing they were doing was working, and that he needed greater diagnostic care in order to get to the cause of his years-long rectal bleeding. Still, with the one disputed exception Dr. Tanner offered right before Mr. Douglas was to be released, neither of these doctors even suggested that Mr. Douglas be further examined for rectal cancer, and instead simply continued their ineffective course of treatment. Under *Greeno*, *Johnson,* and *Kelley*, this is sufficient evidence for a jury to infer that

the doctors were subjectively deliberately indifferent to Mr. Douglas's reasonable medical needs.

Finally, the defendants' subjective deliberate indifference can be also be inferred from their long course of negligent conduct. The defendants suggest that Mr. Douglas's treatment was at most negligence, rather than deliberately indifferent. Def's SJ Memo. 17. And, while it is true that negligence, incompetence, or even medical malpractice do not amount to deliberate indifference, *Pierson v. Hartley*, 391 F.3d 898, 902 (7th Cir. 2004); *Walker v. Peters*, 233 F.3d 494, 499 (7th Cir. 2000), the Supreme Court has cautioned that the question of whether the treatment afforded a prisoner amounts to deliberate indifference or negligence is often a factual one inappropriate for resolution on summary judgment. *See e.g., West v. Atkins*, 487 U.S. 42, 48, n. 8 (1988) (reinstated eighth amendment claim and refused to resolve the parties' dispute whether the medical care provided amounted to negligence or deliberate indifference, which would require "necessary factfinding"); *see also Farmer*, 511 U.S. at 842 (issue of knowledge of an excessive risk of harm under the eighth amendment is a question of fact); *Sherrod v. Lingle*, 223 F.3d 605, 611 (7th Cir. 2000) (summary judgment against plaintiff on eighth amendment claim reversed because the issue of whether a prison employee acted with deliberate indifference is a question of fact). *Weyant v. Okst,* 101 F.3d 845 (2d Cir. 1996) ("under either [fourteenth amendment or eighth amendment] standard, the state of the defendant's knowledge is normally a question of fact to be determined after trial."). As stated above, there is ample evidence for a jury to draw the inference that these two defendants acted with deliberate indifference.

Additionally, where, as here, there is a continued series of what could be viewed in isolation as negligent acts, but which have repeatedly occurred, the factfinder is reasonable in construing such treatment to amount to deliberate indifference. *Smego v. Mitchell*, 723 F.3d 752, 757 (7th Cir. 2013)

("Perhaps some of Dr. Mitchell's alleged conduct, standing alone, could be regarded simply as negligence. But a reasonable jury could look at this pattern and infer deliberate indifference, particularly because Dr. Mitchell offered no medical justification" for her actions.); *Board v. Farnham*, 394 F.3d 469 (7th Cir. 2005) (repeated failures to provide inmate with inhaler) ("As we have noted in the past, 'deliberate indifference can be evidenced by repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff.'").

Defendants want the court to view the health care provided to Mr. Douglas in isolated segments, rely on the fact that some type of treatment was sometimes afforded Mr. Douglas, and conclude there is nothing more here than perhaps isolated instances of negligence but not deliberate indifference. But a factfinder is entitled to consider the care Mr. Douglas received in its entirety and draw reasonable inferences therefrom about the subjective states of mind of Doctors Tanner and Raham. *Preston v. O'Brien*, 2014 U.S. Dist. LEXIS 135968 (S.D. Ind. Sept. 26, 2014) ("A court examines the totality of an inmate's medical care when determining whether prison officials have been deliberately indifferent to an inmate's serious medical needs.") (citing *Reed v. McBride*, 178 F.3d 849, 855 (7th Cir. 1999)).

This case is not unlike *Kelley*, 899 F.2d at 617 wherein the Seventh Circuit reversed summary judgment entered against a prisoner who alleged that prison authorities and doctors repeatedly failed over a three year period to adequately respond to his chronic foot problems. The inmate in *Kelley* asserted, like Mr. Douglas here, that he repeatedly complained about his medical problem, and, while seen by medical staff, was only superficially treated, and only provided the same ineffective treatment over and over which never addressed the underlying cause of his health problems. *Id.*, 899 F.2d at 616 ("After repeated requests to see a doctor, he alleges that a doctor gave him a cursory

examination and prescribed the same treatment that failed earlier to work."). The Seventh Circuit reversed summary judgment, citing its precedent that "repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff' can sufficiently evidence deliberate indifference." *Id*., 899 F.2d at 617.

A reasonable fact finder could view the entire actions and inactions of both physicians here as evidencing subjective deliberate indifference, and therefore these defendants are not entitled to summary judgment.

D. Plaintiff's Evidence is Sufficient for a Reasonable Jury to Conclude that the Deliberately Indifferent Health Care Afforded Mr. Douglas was Pursuant to Defendant Corizon's Practice of Delivering Systemically Inadequate Care

1. Respondeat Superior Liability Should be Applicable to a Private Corporation Such as Corizon Providing a Public Function

Respondeat superior liability should apply under § 1983 to private entities such as Corizon providing governmental services rather than a policy or practice requirement pursuant to *Monell*. *Shields v. Ill. Dep't of Corr.*, 746 F.3d 782, 796 (7th Cir. 2014). As Judge Hamilton explained in *Shields*, the application of *Monell* to private corporations is not mandated by U.S. Supreme Court precedent, and is unwarranted by principles governing governmental or private entity liability. *Shields*, 746 F.3d at 790.("A close look at the reasoning of *Monell* provides no persuasive reason to extend its holding to private corporations.").

Judge Hamilton explained in *Shields* that the underlying premise of *Monell*, that the 1871 Congress did not intend to extend vicarious liability to governmental entities for the constitutional wrongs of its employees, has been sharply criticized and is likely incorrect. *Id* at791-792 ("Perhaps

the most important criticism to emerge from this literature is that *Monell* failed to grapple with the fact that respondeat superior liability for employers was a settled feature of American law that was familiar to Congress in 1871, when § 1983 was enacted. Congress therefore enacted § 1983 against the backdrop of respondeat superior liability, and presumably assumed that courts would apply it in claims against corporations under § 1983.").

Of course, as Judge Hamilton recognized, *Monell* remains controlling precedent unless or until the Supreme Court overturns it, and therefore lower courts are duty-bound to follow it. *Id* at 792. However, because the Supreme Court has not yet ruled on *Monell's* application to private corporations, lower court can reexamine and decide whether to extend *Monell* to such entities. And, while existing controlling law in the Seventh and other Circuits has extended such protection to private corporations, there are good reasons not to do so, including the fact that respondeat liability was the norm for private corporations in 1871, the text of § 1983 does not suggest some other type of liability, the records of the congressional debates on the legislation are silent on this issue, and none of the Circuit Court decisions extending such liability have fully examined the question. *Id* at 793-796.

Shields did not decide this question as it was not truly before it, as explained by Judge Tinder in his concurrence. The case is presently pending a petition for certiorari. Additionally, plaintiff understands that this court is required to apply existing Seventh Circuit precedent on this issue, which extends *Monell* liability to private corporations. See *Iskander v. Forest Park*, 690 F.2d 126, 129 (7th Cir. 1982). As Judge Hamilton noted in *Shields*, it will take a decision by the Supreme Court or an en banc ruling by the Seventh Circuit to alter this rule. *Shields*, 746 F.3d at 789. Nevertheless, plaintiff presents the argument here to preserve it for possible future presentation

before either or both forums.

2. The Deliberate Indifference to Mr. Douglas Serious Medical Needs was Pursuant to Corizon's Practice of Providing Such Care to Prisoner

Just as a series of negligent acts can support an inference of deliberate indifference against individual prison doctors, so too can such a scenario create an inference of deliberate indifference on the part of a corporate entity.

Under such circumstances, a number of courts have said that "repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff" may add up to deliberate indifference of prison administrators. *Ramos v. Lamm,* 639 F.2d 559, 575 (10th Cir. 1980); *Wellman v. Faulker*, 715 F.2d 269, 272 (7th Cir. 1983) ("repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff" could permit an inference of deliberate indifference against prison authorities); *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977) ("while a single instance of medical care denied or delayed, viewed in isolation, may appear to be the product of mere negligence, repeated examples of such treatment bespeak a deliberate indifference by prison authorities to the agony engendered by haphazard and ill-conceived procedures."); *Robert E. v. Lane*, 530 F. Supp. 930, 940 (N.D.Ill. 1981) ("A pattern of similar instances presumptively indicates that prison administrators have, through their programs and procedures, created an environment in which negligence is unacceptably likely.").

Here the series of at least negligent acts of failing to adequately diagnosis or treat Mr. Douglas over a period of over two years were performed by Corizon doctors known by Corizon to have repeatedly engaged in medical malpractice both before they were hired and while employed.

As Justice Stevens explained: "Like the rest of us, prisoners must take the risk that a competent, diligent physician will make an error. Such an error may give rise to a tort claim but not necessarily to a constitutional claim. But when the State adds to this risk, as by providing a physician who does not meet minimum standards of competence or diligence or who cannot give adequate care because of an excessive caseload or inadequate facilities, then the prisoner may suffer from a breach of the State's constitutional duty." *Estelle*, 429 U.S. at 116 n.13 (dissenting opinion). See also *Robert E. v. Lane,* 530 F. Supp. 930, 940 (N.D. Ill. 1981).

A reasonable jury could also conclude that Doctors Tanner and Raham failed to diagnose Mr. Douglas's rectal cancer because of Corizon's failure to equip its patient examination rooms with a sigmoidscope. Dr. Tanner's utilized one in his private practice, and admits that it may have been helpful in properly examining and diagnosing Mr. Douglas. Tanner Depo. 20-21. Such a failure of facilities can indicate deliberate indifference. *Lane,* 530 F. Supp. at 940.

Here, Mr. Douglas suffered from the repeated failure of these doctors and Corizon's other medical staff, to get to the root of his problem, which was a bleeding, painful, cancerous tumor growing ever larger in his rectum. He did all he could over the vast majority of two years to get a diagnosis of his problem and relief, but was provided only superficial and repeatedly ineffective care. Under such circumstances, the finder of fact is warranted in finding an inference of deliberate indifference. Accordingly, defendant Corizon is not entitled to summary judgment.

3. Denial of Corizon's Summary Judgment Motion is Warranted Based Upon its Refusal to Provide Relevant Discovery on the Issue

As this Court is aware, at the same time Corizon has moved for summary judgment based upon *Monell*, it has refused to provide plaintiff with discovery relevant to that issue. Doc. No. 71

(11/19/14) (Order on Plaintiff's Motion to Compel); Doc. No. 72 (12/10/14) (Corizon's Rule 72 Appeal).[3]

At issue in Corizon's objection to the Magistrate's discovery order is whether Corizon must produce evidence of its settlement of other cases against it alleging inadequate or improper inmate medical care. Plaintiff's Motion to Compel (Doc. 54) at p. 5. This information is relevant and may lead to relevant evidence of Corizon's pattern of providing deliberately indifferent health care to other prisoners. Indeed, while at the same time Corizon is denying plaintiff this discovery, it argues on summary judgment that "[p]laintiff must also offer evidence of other offenders who have been subjected to the same allegedly indifferent conduct as she [sic] complains about, because a custom cannot be established through a single incident." Def's SJ Memo 18.

While plaintiff believes that the evidence he has offered above of Corizon's employment of malpracticing physicians, failure to adequately equip its medical facilities, and its years-long denial to Mr. Douglas of adequate medical care, is sufficient for a trier of fact to conclude Corizon was deliberately indifferent to Mr. Douglas, if the Court finds that plaintiff must show that other prisoners were also deprived of constitutionally adequate health care, it should nevertheless deny Corizon's motion based upon its refusal to allow timely discovery of such instances. Indeed, even if this Court upholds Magistrate Dinsmore's discovery order, any such discovery ultimately produced by Corizon would need to be further investigated and developed in order to be presented at trial, and would come much too late in the litigation process to be considered on summary judgment.

Accordingly, if this Court finds plaintiff's present response to Corizon's summary judgment

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[3] At the time of this filing (12/15/14), plaintiff has yet to respond to Corizon's Rule 72 appeal. That response is due 12/22/14 and plaintiff incorporates the arguments to be set forth in his response to that motion here.

motion lacking in relevant evidence of other prisoner cases, it should nevertheless exercise its authority under Fed. R. Civ. Pro. 56 (d) (1) to deny Corizon's motion based upon Corizon's refusal to provide relevant and discoverable information bearing upon that issue. Where a court determines that facts are unavailable to a party responding to a motion for summary judgment, the court may "defer considering the motion or deny it." Fed. R. Civ. Pro. 56 (d) (1). Denial of the motion seems particularly appropriate where the moving party itself has possession of the facts and denied the same to the responding party. *See Plott v. Gen. Motors Corp.,* 71 F.3d 1190, 1196-97 (6th Cir. 1995) (listing, as one considerations in whether to deny a motion for summary judgment pursuant to Rule 56 (d) (1) motion, "whether the non-moving party [the summary judgment movant] was responsive to discovery requests"); *Coles v. Eagle*, 2014 U.S. Dist. LEXIS 143466 *9 (D. Haw. Oct. 8, 2014) ("This Court FINDS that, for the reasons set forth in Coles's Sanctions Motion and the magistrate judge's 9/3/14 Sanctions Order, Coles cannot present the essential facts necessary for him to oppose the City's Merits Motion. This Court further FINDS that the appropriate relief under Rule 56(d) is to DENY the Merits Motion WITHOUT PREJUDICE. See Rule 56(d)(1)").

Because Corizon has refused to provide discovery relevant to the *Monell* issue, this Court should exercise its inherent power as well as its authority pursuant to Fed. R. Civ. Pro. 56 (d) (1) to deny that portion of Defendant Corizon's Motion for Partial Summary Judgment.

Conclusion

Corizon, Dr. Tanner and Dr. Raham were deliberately indifferent in the treatment of Mr. Douglas. As a result, his cancer grew and spread, he languished in excruciating pain for years, and the eventual treatment of his condition, once discovered, was more invasive and less successful than

it otherwise would have been. There are sufficient facts to enable a reasonable jury to find for Mr. Douglas on his eighth amendment claims against all three defendants. Defendants' motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 15, 2014, a copy of this document was filed electronically. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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